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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-312

ROMAN GRIBBS, Mayor of the City of Detroit, *et al.*,

Petitioners,

—v.—

AMERICAN MINI THEATRES, INC.,
A Michigan Corporation, *et al.*

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*, AND BRIEF *AMICI CURIAE*

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The American Civil Liberties Union and the American Civil Liberties Union of Michigan respectfully move for leave to file a brief amici curiae in the above-entitled case. The attorneys for Respondents

have consented to our request to file; the attorneys for Petitioners did not respond to our request.

We believe that the purpose of the zoning ordinances involved in this case is to suppress literature and films which are protected by the First Amendment. If zoning ordinances are thus to be used indirectly to defeat First Amendment rights, when direct suppression of those rights would be forbidden, municipalities will be armed with a weapon that they can indiscriminately utilize to suppress other forms of protected expression in addition to so-called "adult books" and "adult films." This scheme must be nipped in the bud lest it endanger a whole range of constitutionally protected rights. We believe our brief will assist the Court in resolution of the case.

It is therefore respectfully moved that leave be granted to file the attached brief.

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, AMICI CURIAE

INTEREST OF AMICI

The interest of amici curiae is set out in the preceding Motion for Leave to File.

STATEMENT OF THE CASE 1/

In 1969, there were located within the City of Detroit two "adult" bookstores, two "adult" theatres, and an insignificant number of "topless" cabarets. By mid-1972 the number of "adult" theatres had increased to eighteen, "adult" bookstores had increased to twenty-one, and "topless" cabarets numbered approximately seventy. Reports submitted to the Detroit City Council by the Police Department indicated that many of these "adult" businesses were clustering on main streets of the City (and Highland Park, a city within the City of Detroit), which were immediately adjacent to residential neighborhoods. Acting upon complaints of such neighborhood residents, the City Council enacted Ordinance 742-G, amending the Official Zoning Ordinance by including "adult" theatres and bookstores, and Class "D" (topless) cabarets in the category of "regulated uses." Regulated uses" were those uses determined from experience to have a deleterious effect on a neighborhood, and included taxi dance halls, bars, motels, pawnshops, etc. (Sec. 66.0000). Such uses were restricted in their location, i.e., no more than two "regulated uses" were to be permitted within 1,000 feet of each other. This prohibition could be waived by the City Plan Commission upon a showing that the proposed

1/ The Statement of the Case is taken from the Petition for Certiorari.

locations of the "regulated use" would not be injurious to the surrounding area. (Sec. 66.0101.)

In addition, Sec. 66.0103 of the Ordinance prohibited the location of an "adult" business within five hundred feet of a residential unit unless the prohibition was waived by the consent of fifty-one percent of the persons living or doing business within five hundred feet of the proposed location. 2/

Ordinance 743-G amended the Municipal Code to include "adult" theatres under Chapter 5, Article 2, entitled "Public Entertainment Generally" and required that they be licensed by the City.

Subsequent to the enactment of the above described ordinances on November 2, 1972, the Respondent Nortown Theatre, Inc.

2/ The District Court ruled thatthis provision was unconstitutional as it was more restrictive than necessary to achieve the City's legitimate governmental purpose. The Court stated that the ordinance, as written, protected a single residential unit, when the City continually asserted its purpose in enacting the ordinance was the protection of neighborhoods. In order to correct the "defect" noted by the District Court, the City amended Sec. 66.0103 to prohibit the location of "adult" businesses within five hundred feet of a "residentially zoned district." (See Ordinance 891-G, App I, pp. 84-92.)

began exhibiting films which were "adult," as defined in Sec. 32.0007 in an established theatre which was within 1,000feet of several other regulated uses and within five hundred feet of a residential area. The Respondents American Mini Theatre, Inc. and Pussy Cat Theatres, Inc., converted a corner gas station to a mini theatre and offered similar "adult" fare for exhibition. The newly renovated theatre was within 1,000 feet of two other regulated uses and within five hundred feet of a residential area. The Respondents were notified by the Petitioners of the City's intention to enjoin their operation under the State Zoning Enabling Act and the City zoning ordinances.

In the spring of 1973, following such notification, the Respondents claimed their constitutional rights under the First, Fifth, and Fourteenth Amendments were threatened by the proposed action of the various City officials, and sought declaratory and injunctive relief in the United States District Court, Eastern District of Michigan, under 42 USC 1983. The jurisdiction of the Court was invoked under 28 USC 1331 and 28 USC 1343(3).

The District Court consolidated the cases for argument and on March 22, 1974 issued a joint opinion which recognized the City's legitimate governmental purpose, and upheld the validity of the challenged ordinances with the exception noted in Footnote 2 above. Respondents appealed the decision to the Sixth Circuit Court of Appeals. On

June 16, 1975, the Court of Appeals, in a two to one decision, ruled that the ordinances were unconstitutional.

ARGUMENT

I

DETROIT'S ZONING AND LICENSING SCHEME FAILS TO DISTINGUISH BETWEEN UNPROTECTED CONDUCT AND PROTECTED EXPRESSION, AND IS THEREFORE OVERBROAD IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

The City of Detroit urges that it can limit and control so-called "adult enterprises" because the ordinance at issue deals with conduct rather than speech, and is therefore not subject to the strict limitations of the First Amendment. To support that claim, it cites a list of cases and concludes that it has met the standards which justify governmental regulation as announced in United States v. O'Brien, 391 U.S. 367 (1968).

O'Brien, which upheld the constitutionality of legislation punishing the destruction and mutilation of draft cards, rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever a person engaging in the conduct intends thereby to express an idea." But draft card burning cannot analytically be compared to the exhibition of motion pictures or the sale of a magazine or book. In O'Brien it was conceded that the statute dealt only with conduct and was not facially defective. But here we are dealing with the distribution of books, magazines and

films to the general public, and there are a long line of cases that have held that these activities, unlike draft card burning, are a form of expression entitled to full First Amendment protections. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Jones v. Opelika, 316 U.S. 584, (1942); Marsh v. Alabama, 326 U.S. 501 (1946).

However, motion pictures are not absolutely immune from governmental interference or regulation. If obscene, they, like other modes of expression, fall outside of First Amendment protections. Miller v. California, 413 U.S. 15 (1973); United States v. Roth, 354 U.S. 476 (1957); Memoirs v. Mass., 383 413 (1963). But the City of Detroit does not contend that the purpose of this ordinance is to regulate only those things that stand outside of the First Amendment. It claims to be engaging in the legitimate governmental function of zoning to prevent the deterioration of neighborhoods and states that it can pursue that objective even if its regulations place incidental limitations on First Amendment freedoms. While "[m]ere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, they are insufficient to justify such as diminishes the exercise of rights so vital" as freedom of speech. Schneider v. State, 308 U.S. 147 (1939). Rather, in order for the City of Detroit to restrict, impede, limit and control expression, it must show that the

expression is "used in such circumstances and of such a nature as to create a clear and present danger that [it] will bring about the substantive evils that [the City] has a right to prevent." Schenck v. United States, 249 U.S. 47 (1919); Brandenberg v. Ohio, 395 U.S. 414 (1969).

When the City's ordinance is measured by this strong standard, it proves to be woefully inadequate. The City asserts that if a skid row atmosphere develops as in the 42nd Street district of Manhattan, there will be a "formidable increase in street crimes, prostitution and dope peddling, and a wide variety of other evils." 3/ These are precisely the same interests which have been asserted time and again as justification for laws banning frank discussions of sexual relationships, and which have been consistently rejected by this and other courts. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Butler v. Michigan, 352 U.S. 380 (1957); Winters v. New York, 333 U.S. 507 (1948); Louisiana v. Dayries, 187 F. Supp. 241 (D.C. La. 1960); and compare United States v. Two Obscene Books, 99 F. Supp. 760, with United States v. Roth, supra. The empirical link between sex-related entertainment and criminal activity popularly associated with such entertainment has never been proven, and recent investigations tend strongly to disprove it. See,

3/ Petitioner's Brief, pp. 20-21.

Report of the Commission on Obscenity and Pornography 27 (1972); Cairns, Paul and Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962). Even if such a link existed, it would not justify Detroit's attack on First Amendment freedoms, for its interest in controlling material dealing with sex is secondary. Primarily, its concern should be with controlling, restricting, limiting and preventing prostitution, drug abuse, rape and other anti-social acts, by punishing them under criminal statutes, rather than by punishing speech which is thought, even in the absence of evidence, to have some remote relationship to such acts.

The ordinances at issue attempt to define and regulate both the quality and quantity of the content of expression. In attempting to define the quality, by dividing it into two categories 4/ each with several sections, the ordinance regulates and affects speech in the sense forbidden by Burstyn and Erznoznik. The ordinance does not deal with unprotected speech, i.e., obscenity, but on the contrary, especially limits itself to a definition of content, which has been rejected as a definition of obscenity. Jenkins v. Georgia, 418 U.S. 153 (1974); Erznoznik v. City of Jackson-

4/ "Specified Sexual Activities" and "Specified Anatomical Areas."

ville, supra, Memoirs v. Massachusetts, supra; Grove Press v. Christianberry, 276 F. 2d 433 (2nd Cir. 1960); United States v. One Carton Positive Motion Picture Film, 367 F. 2d 889 (2nd Cir. 1966); United States v. A Motion Picture Film, 404 F. 2d 196 at 199 (2nd Cir. 1968); United States v. Goldstein, 73 F. Supp. 875 (D.C. N.J. 1947); Louisiana News v. Dayries, supra; Excelsior Pictures v. Chicago, 182 F. Supp. 400 (D.C. Ill. 1960); LeBaron v. Olesen, 125 F. Supp. 53 (D.C. Cal. 1954); Sunshine Book Company v. Summerfield, 128 F. Supp. 564 (D.C. D.C. 1955); P.B.I.C. v. Byrne, 313 F. Supp. 757 (D.C. Mass. 1970) stay denied 90 S. Ct. 1718. The portrayal of sexual activities or anatomical areas standing alone is not obscene. Miller v. California, supra; Jenkins v. Georgia, supra. However, it is precisely these non-obscene, constitutional acts and scenes which have been chosen by the City of Detroit to be restricted, controlled, zoned and licensed out of the City, rather than those contents which have been declared unprotected by the First Amendment. If the purpose of the ordinance is, as the City contends, to prevent the clustering of businesses which threaten to cause neighborhood deterioration, the City must tailor its zoning and licensing attack to apply only to those enterprises which have been found unworthy of constitutional protections because the content of their material, taken as a whole, has been considered to be without any serious literary, artistic, political or scientific value,

appeals to prurient interests, and depicts sexuality in a patently offensive manner. Miller v. California, supra. By failing that test, it is overbroad because it impermissibly affects protected content as well as unprotected content; Grayned v. City of Rockville, 408 U.S. 104 (1972); Shelton v. Tucker, 364 U.S. 479 (1960); N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964).

II

THE DETROIT ORDINANCES ARE AN INVALID SCHEME TO PROHIBIT EXPRESSION ADMITTEDLY ENTITLED TO FIRST AMENDMENT PROTECTION.

The City of Detroit contends that the ordinances at issue do not provide for "a blanket prohibition against the operation of adult businesses within its territorial limits," 5/ but the practical effect of the ordinance makes this statement untrue. Section 66.0103 of the ordinance provides:

> It shall be unlawful to hereafter establish an Adult Book Store, Adult Motion Picture Theater, Adult Mini Theater or Class 'D' Caberet within 500 feet of any residentially zoned district.

There is virtually no location within the

5/ Petitioner's Brief, pp. 2, 27.

territorial limits of the City of Detroit that is not "within 500 feet of any residentially zoned district," except perhaps Palmer Park or Belle Isle (which are not available for commercial development), the downtown area, and a few heavily industrialized areas. Therefore, what the City cannot do directly, it seeks to do indirectly by establishing conditions, rules and regulations making it impossible for "adult businesses" to be established. Thus, such "adult businesses" are not only subject to the 1000 foot limitation, but are also forbidden if within 500 feet of a residentially zoned district. The practical result of these limitations is to confine "adult businesses" to downtown Detroit.

The existence of a waiver provision in the ordinance does not cure its inherent defects. The fact that a majority of a community disapproves of such activity cannot justify suppression of First Amendment activities. The First Amendment was designed to protect minority rights from the tyranny of the majority. To claim that a movie theater or bookstore should not operate because the majority of the neighbors in that locale do not want it, destroys the purpose of the Bill of Rights. Freedom of expression is not dependent upon a plebiscite.

Using its powers of zoning and licensing as a facade, the City of Detroit has devised a scheme to prohibit what it admits

are legal and constitutional activities. On a previous occasion, the City adopted a zoning regulation designed to thwart blight and inhibit the deterioration of neighborhoods which, if applied to so-called "adult businesses," would not tend to prohibit legitimate, legal and constitutionally protected business. But by adopting a more restrictive scheme in 1972 which applies exclusively to adult business, the City has demonstrated that its motive was not to protect neighborhoods, but to drive constitutionally protected activities out of the City. The effect is the same as if the First Amendment were repealed in Detroit.

Zoning and licensing cannot be used as an instrument to invade the freedoms of speech or press. Those rights are the foundation upon which our free society rests; without them none of our other rights are secure. The true meaning of the First Amendment guarantees is that they are guarantees against the tyrannies of the majority --real or imagined. The purpose of the First Amendment is to guarantee that minority expression can exist. If in the name of zoning and licensing, Detroit can inhibit and prohibit sexual expression because it is deemed obnoxious to the majority, then Detroit and every other community, in the name of the power to zone and license can inhibit and prohibit expression of sexual matters that are deemed obnoxious to the majority, social matters deemed obnoxious to the majority, political matters deemed

obnoxious to the majority, religious matters deemed obnoxious to the majority, and economic matters deemed obnoxious to the majority. If that be true, then what use are those guarantees of freedom as contained in the Bill of Rights?

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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